

**BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS**

In the Matter of D.R.W., Crown Point Community)	
School Corporation, and the Northwest)	
Indiana Special Education Cooperative)	
)	Article 7 Hearing No. 1105.99
Appeal from a decision by)	
Jerry L. Colglazier, Esq.,)	
Independent Hearing Officer)	

Procedural History

This matter commenced on June 24, 1999, with the receipt by the Indiana Department of Education of a request for a hearing on behalf of D.R.W. (hereafter, the Student) and against the Crown Point Community School Corporation and the Northwest Indiana Special Education Cooperative (hereafter, referred to collectively as the School). The primary issue was whether or not the Student is eligible for special education and related services. Related issues raised by the Student involved the appropriateness of the educational evaluation conducted by the School, whether or not the School should have known or suspected the Student had a disability, and whether or not the Student's suspension and proposed expulsion from middle school were appropriate.

Nealon Gaskey, Ed.D., was appointed initially as the Independent Hearing Officer (IHO). Dr. Gaskey conducted pre-hearing conferences by telephone on July 13, 1999, and July 21, 1999. He issued a joint pre-hearing order on August 3, 1999, wherein the following issues were identified for hearing purposes:

1. The eligibility of the Student for special education and related services;
2. The appropriateness and independence of the educational evaluation of the Student; and
3. The appropriateness of the current educational program and placement of the Student, and specifically, the appropriateness of the suspension of the Student.

The IHO deferred ruling on the appropriateness of the suspension as well as what the Student's current educational placement would be during the pendency of the proceedings. The IHO did determine that the educational evaluation was incomplete, especially with regard to a possible visual disability. The School was to arrange for an evaluation and then determine whether the Student might be eligible for services. Both parties agreed to an extension of time.

The events precipitating this hearing request occurred on or about May 19, 1999, when the principal at the Student's middle school suspended the Student pending expulsion for allegedly possessing a handgun at a school-sponsored athletic event. The circumstances surrounding the Student's interrogation are presently embroiled in separate litigation that is unrelated to this matter. The parent did not initiate a referral until the suspension occurred.

A third prehearing was conducted on August 6, 1999, but the pre-hearing order was not issued until October 14, 1999. The IHO found that the School was not on notice, actual or constructive, that the Student had or may have an education-related disability. Because the referral was not initiated until after the suspension pending expulsion occurred, the IHO declined to order the Student reinstated in school pending exhaustion of these administrative proceedings.

On September 23, 1999, the School moved for an extension of time in order to receive the evaluation results from the independent evaluator and conduct a case conference committee to consider the results. The IHO granted the motion on October 14, 1999, extending the time within which to conduct a hearing and render a written decision to November 29, 1999. Thereafter, the IHO resigned from his position.

Jerry L. Colglazier, Esq., was appointed on October 19, 1999, as IHO, succeeding Dr. Gaskey. Mr. Colglazier contacted the representatives of the parties via telephone on October 22, 1999, and established November 2, 1999, for a telephonic status conference. An order to this effect was issued on October 23, 1999.

The status conference was conducted on November 2, 1999. The IHO noted that although the Student was suspended from the middle school, educational services were continuing through a homebound arrangement. The IHO ordered the parties to exchange certain documents, including educational records and test results. The IHO also ensured the parties were aware of their hearing rights. The issues for hearing were reviewed and restated as follows:

1. Is the Student eligible for special education and related services?
2. Was the educational evaluation of the Student appropriate?
3. Did the School have knowledge, or should have had knowledge, of a disability pursuant to 20

USC §1415(k)(8) before the occurrence of the alleged behavior leading to the suspension?

The parties jointly moved for an extension of time, which was granted to and including January 12, 2000. Hearing dates were established for December 13, 14, and 15, 1999. Separate orders and notices were issued in these respects.

On November 11, 1999, counsel for the Student, by letter, raised sixteen (16) additional issues. However, the IHO, by letter dated November 15, 1999, found that the sixteen (16) issues were actually related to issue No. two, *supra*.

The hearing was conducted on December 13 and 14, 1999. The IHO issued his written decision on January 10, 2000. At the final hearing in this matter, the Student, by counsel, raised two additional issues, both essentially procedural in nature and more related to the case conference committee than the hearing. The IHO noted that these issues, as separately stated, were raised belatedly and would be considered only in consideration of the three substantive issues previously stated.

The IHO's Written Decision

The IHO determined twenty-six (26) Findings of Fact. The Student is fourteen (14) years old (d/o/b 12/19/85). He was a seventh grade student in the middle school prior to May 18, 1999, but not identified as in need of special education and related services. The Student was suspended on May 19, 1999, for alleged misconduct, pending expulsion, until the beginning of the 2000–2001 school year. The parent initiated a referral for special education on May 26, 1999, asserting the Student had a visual disability that affects interactions with others and his ability to learn. The School has continued services for the Student through a homebound arrangement since the third week of September, 1999.

Assessment results ranged from the low average to above average. The WISC-III scores were in the low average range (verbal score 94, performance score 82, full scale score 87). Social, emotional, and self-concept assessments were generally unremarkable, although the Student was considered in the “at risk” range for taking responsibility, sensation seeking, self-control, sense of inadequacy, depression, and self esteem. Processing factors as measured by the Woodcock Johnson were above average except as to visual closure skills and the ability to respond when uncertain. Visual screening by a teacher for the visually impaired and an optometrist did not detect a vision impairment, although the teacher reported lower scores in “visual form constancy” and “visual closure,” but these were not attributed to a visual problem. The optometrist did identify reduced vision in the left eye due to amblyopia (“lazy eye”), hypertropia (muscle imbalance), and a focusing dysfunction that can cause visual discomfort and loss of concentration, and may cause blurry vision at all ranges.

The case conference committee considered the evaluative data and determined the Student did not meet the criteria for a visual impairment. The parent and counsel dissented. The IHO did not find that the case conference committee members were unduly influenced by having some knowledge of the

incident precipitating the referral, nor did the School fail to follow case conference committee procedures. Although the School was aware of the physical appearance of the Student's left eye ("lazy eye"), there was no evidence that the "lazy eye" constituted a visual impairment necessitating special education and related services. There is also no evidence the Student has a learning disability or suffers from an emotional handicap. The School did not have actual or constructive knowledge that the Student does have or may have a disability. The IHO also determined there was no evidence to support a finding that the Student had a hearing impairment or was "other health impaired," or that these should have been considered by the case conference committee.

From these 26 Findings of Fact, the IHO reached eight (8) Conclusions of Law. The IHO explained the function of the due process hearing procedures, especially as this relates to decisions reached within a case conference committee is not an adjudicatory body and is not subject to the Administrative Orders and Procedures Act (AOPA), I.C. 4-21.5-3 *et seq.* As to the substantive issues, the IHO concluded that the Student was not eligible for special education and related services, the educational evaluations conducted by the School was procedurally compliant with state and federal law, and the School did not have actual or constructive knowledge that the Student had, or may have, a disability requiring special education and related services.

Appeal to the Board of Special Education Appeals

The IHO properly advised the parties of their appeal rights. The IHO also entered an order on January 27, 2000, staying termination of the Student's homebound instruction and initiation of the expulsion proceedings pending appeal to the Board of Special Education Appeals (BSEA). A hearing for this limited purpose was conducted by the IHO on January 17, 2000.

The Student's Petition for Review

The Student timely filed his Petition for Review on February 10, 2000. He takes general exception to the IHO's determination that he is not eligible for special education and related services, the School complied with state and federal law in the conduct of the educational evaluations, and the School did not have actual or constructive knowledge that the Student had, or may have, a disability. The Student reiterated these same exceptions as to Conclusions of Law Nos. 6, 7, and 8.

The Student also objects to the IHO's general jurisdictional statement found in Conclusion of Law No. 1, which asserts the IHO had the authority to conduct a hearing and render a decision regarding the three substantive issues before him. The Student appears to believe that a case conference committee is an adjudicatory body such that an IHO cannot supplement the record on appeal but must consider the matter on the record established during the case conference committee. Accordingly, the Student objects to Conclusions of Law Nos. 3, 4, and 5, which attempted to explain the role and function of an

IHO vis-a-vis a case conference committee. The Student apparently believes a case conference committee is an adjudicative body that must render Findings of Fact and Conclusions of Law in order to facilitate judicial review.¹

The Student objects to certain Findings of Fact, which, by necessity, will be addressed below but not detailed here. Generally, the Student objects to the IHO's jurisdictional statement, his reliance on certain testimony regarding assessments, the possible "tainting" of the case conference committee due to the alleged misconduct that resulted in the referral, and the failure of the case conference committee to create a record sufficient for judicial review.

The Student also objects to the IHO's exclusion of certain tendered exhibits. These exhibits constitute a separate civil action by the Student against the School, along with certain newspaper accounts. The IHO found these not relevant to the issues before him.

The School's Response

The School timely responded on February 21, 2000. The School noted that state law defines the jurisdiction of an IHO, and that this jurisdiction extends to broadly defined areas involving eligibility for services, appropriateness of educational evaluations, placement and any aspect of "free appropriate public education"(FAPE). This sometimes involves so-called "complainable issues" with respect to a child.² An IHO does not sit in strict review of a case conference committee. An IHO may receive additional testimony and additional evaluative data not considered by a case conference committee.

A case conference committee, the School argues, is not a governmental entity, political subdivision, or similar agency. Its function is detailed in state law, and although there may be disagreements, the function of a case conference committee is neither adversarial nor adjudicatory.

The School also asserts that the Student misrepresents the testimony in taking exception to the IHO's findings regarding the various assessments performed on the Student.

¹The Student's Petition for Review contains a number of case law references, none of which are relevant to the instant matter.

² "Complainable issues" are allegations that a public agency has not complied with State or Federal special education laws. These issues are usually investigated by the State Educational Agency (SEA), but where an IHO has jurisdiction, such issues are referred to the IHO. See 34 CFR §§ 300.660–300.662.

Student's Motion to Strike and for Oral Argument

On February 22, 2000, the Student, by counsel, moved to strike certain portions of the School's Response, which specifically identified the alleged misconduct for which the Student faces possible expulsion. The Student then interjects arguments that serve as the basis for the civil complaint, which the IHO excluded as irrelevant. The Student also requested oral argument.

Review By The BSEA

The BSEA declined the Student's request for oral argument and set this matter for review on March 8, 2000, without oral argument and without the presence of the parties. All three members of the BSEA received and reviewed a copy of the record from the hearing below. On Wednesday, March 8, 2000, all three members of the BSEA conducted a review of the matter in the Board Room at Room 225, State House, in the offices of the Indiana Department of Education. The review was tape recorded. A transcript will be made and provided to the representatives of the parties. In consideration of the record below, the Petition for Review and the Response thereto, the BSEA makes the following Combined Findings of Fact and Conclusions of Law.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Indiana Board of Special Education Appeals (BSEA) is the duly authorized body established under 511 IAC 7-15-6 to review the final decisions of Independent Hearing Officers appointed pursuant to 511 IAC 7-15-5. The BSEA has jurisdiction in this matter.
2. The alleged misconduct and resulting interrogation of the student are not considerations in either the hearing or the appeal. The issues before the IHO involved, essentially, questions of eligibility and appropriateness of an educational evaluation. The interjection of the alleged misconduct, although unrelated to the issues, has occurred at the instigation of both parties. Because the alleged misconduct is irrelevant to the issues, the BSEA will not consider the matter further. The Motion to Strike the School's reference to the alleged misconduct is denied. The IHO's decision to exclude from evidence the Student's documentation related to a separate civil action filed on his behalf is upheld.
3. In Indiana, the Case Conference Committee is the same as the "IEP Team" described by Congress at 20 U.S.C. §1414(d)(1)(B) and in the implementing federal regulations at 34 CFR §§300.344-300.346. Indiana, in like manner, defines the Case Conference Committee at 511 IAC 7-3-7 and details the membership and responsibilities at 511 IAC 7-12-1. Congress did not grant an IEP Team an adjudicative function, nor do federal and state regulations. An IEP Team, under any name, is not an adjudicative body that must determine Findings of Fact and Conclusions of Law. The IHO's Findings of Fact and Conclusions of Law in this respect are

accurate statements of law and are upheld.

4. The Individuals with Disabilities Education Act (IDEA) details the due process hearing rights at 20 U.S.C. §1415(f),(g) and 34 CFR §§300.506-300.514. Indiana implements these procedures through 511 IAC 7-15-5 and 511 IAC 7-15-6. The Administrative Orders and Procedures Act (AOPA), I.C. 4-21.5-3 *et seq.*, to the extent it is not in conflict with IDEA, governs such procedures. See 511 IAC 7-15-5(x). The Student in this case invoked the jurisdiction of these procedures. The IHO unequivocally had jurisdiction in this matter, and exercised the responsibilities, obligations, and duties as required by IDEA and the AOPA.
5. Although the Student objects to the Findings of Fact determined by the IHO, all such statements were Findings supported by the record. Accordingly, all of the IHO's Findings of Fact are upheld, although Findings of Fact Nos. 20 and 21 are amended only as to the correct citation of federal statutory provisions at 20 U.S.C. §1415(k)(8), which is a minor editorial correction and does not otherwise affect the sufficiency of the IHO's Findings.
6. The Student objects to seven of the IHO's eight Conclusions of Law. However, the record and the law support the Conclusions drawn by the IHO from the aforementioned Conclusions of Law.
7. Accordingly, the ultimate decisions reached by the IHO that the Student is not eligible, the educational evaluations were appropriate, and the School had no actual or constructive notice that the Student has or may have a disability are upheld.

ORDERS

1. The Student's Motion to Strike is denied.
2. The decision of the IHO is affirmed.
3. All other Motions not directly addressed herein are considered denied.

Date: March 8, 2000

/s/ Richard Therrien, Chair
Indiana Board of Special Education Appeals

Appeal Right

Any party aggrieved by the decision of the Indiana Board of Special Education Appeals has thirty (30) days from receipt of this decision to seek judicial review in a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5.

